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NO.

In the

Supreme Court of the United States

October Term, 1988

Eva J. Culberson
Petitioner

V.

Veterans Administration
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

Eva J. Culberson
(P-30902)
In Pro Per
2230 W. McNichols
Detroit, Michigan 48221
(313) 226-4244

Of Counsel:

Okon Etefia
220 Bagley, #210
Detroit, MI 48226

Arlene Woods
220 Bagley, #210
Detroit, MI 48226

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COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EVA J. CULBERSON

Plaintiff-Appellant,

v. (Filed June 27, 1988)

VETERANS ADMINISTRATION,

Defendant-Appellee.

**APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
(No. 87-1708)**

BEFORE: MILBURN, GUY and NORRIS, Circuit Judges.

PER CURIAM: Plaintiff-appellant Eva Culberson appeals a judgement for the defendant in this action brought pursuant to the Equal Pay Act, *28 U.S.C. Sec. 206 (d)*, and *Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e* et seq.

Ms. Culberson graduated from the University of Detroit College of Law in May of 1979. On September 20, 1979, while awaiting the results of the bar examination, she filed an application for employment with the local District Counsel's Office of the Veterans Administration ("VA") in Detroit, Michigan. She applied for the position of attorney. On her application, Ms. Culberson indicated that she would start as of October 1, 1979, and that she would accept a minimum salary of $16,000.

The head of the VA District Counsel's Office in Detroit was John McMillan, who held the title of District counsel. At that time, however, he was on leave of absence and Assistant District Counsel Ted Fernholz was in charge. Fernholz interviewed Ms. Culberson two or three times for the position, was impressed, and recommended to the General Counsel Office in Washington that she be hired.

In order to qualify for the position of general attorney, the VA's personnel regulations require that one must have passed the bar examination. McMillan testified at trial that it is unusual for the VA to even interview persons for attorney positions who have yet to pass the bar examination, and that all previous hirings at the Detroit office had been restricted to persons who had already passed the bar.

It is uncontroverted that a local District Counsel of the VA does not have the authority to hire employees or establish the terms of employment for its employees. The General Counsel in Washington, D.C., is in control of these determinations. The local office is only empowered to interview potential candidates and to send a list of potential candidates to the General Counsel's Office with a recommendation as to which candidate or candidates should be hired.

In response to a perceived "bracket creep," all local District Counsel Offices at the time of Ms. Culberson's hiring were restricted to hiring attorneys at the GS-9 grade level. The GS-9 grade level was the original entry level for attorneys in the VA. Over time, however, bracket creep had resulted in the average grade level of entering attorney's being at the GS-11 grade level. However, in late 1977 or 1978, the VA was instructed to reduce the entry grade level to GS-9. Therefore, at the time of Ms. Culberson's hiring, virtually all entry level attorneys were hired at the GS-9 grade level. The few exceptions occurred when a District Counsel's office could not find any applicants willing to work at that grade. Ms. Culberson's salary demand of $16,000.00 was less than the existing GS-9 grade level rate of $17,335.00. As a result, her name was included in the list of candidates willing to accept a GS-9 grade level.

Pursuant to the local District Counsel's recommendation, the General Counsel hired Ms. Culberson on October 21, 1979. As she had not yet received her bar examination results, she was hired as a law clerk. While the Detroit office had never previously employed anyone as a law clerk, the position had been used elsewhere in the VA for law school graduates who had not yet passed the bar. It is uncontroverted that the understanding between the VA and Ms. Culberson was that if she passed the bar examination, her law clerk's position would be converted into a general attorney position. At trial, Ms. Culberson contended that Fernholz also informed her that her grade level would be converted from GS-9 to GS-11 upon her passing the bar. This was denied by Fernholz, who insisted he informed Ms. Culberson that her grade level would stay the same if her position were converted to that of an attorney.

Two weeks after she was hired, Ms. Culberson received word that she had passed the bar examination. The VA then converted her position to that of attorney, but declined her demand that she be given a grade and pay increase to the GS-11 level. Under the VA's personnel regulations, when an employee is hired at the GS-9 grade level, the employee must wait at least a year before being eligible for promotion to GS-11. The local District Council Office informed Ms. Culberson that they could not consider giving her a promotion to the GS-11 grade level until she met the one-year time-in-grade requirement.

Ms. Culberson then filed a discrimination complaint. In an effort to resolve the dispute, McMillan sent a letter to the General Counsel's Office on August 8, 1980, seeking an exception to the time-in-grade rule to allow Ms. Culberson to be

promoted to the GS-11 grade level prior to one year in service. McMillan stated that she was performing at or above the GS-11 grade level. However, the General Counsel's Office declined to make an exception. While several exceptions had been requested in the past, the General Counsel's Office has never granted one. After Ms. Culberson served one year at grade GS-9, she was promoted to grade level GS-11. At the present time, Ms. Culberson is still employed by the Detroit office of the VA and is currently a GS-13, having received all the grade promotions available to her.

At the time of Ms. Culberson's hiring, Richard Cunningham also began working at the office as a general attorney. Cunningham, a ten-year employee of the VA, had become an attorney six months prior to his reassignment. He had previous experience as the Chief of Filed Services in another area of the

VA and was allowed to keep his GS-12 grade on reassignment.

In 1977, the Detroit office hired Ms. Maureen Faes, a white female, as a general attorney. At the time of her employment, Ms. Faes had been a member of the bar for two years and had previous experience as a schoolteacher. She was hired at the grade level of GS-11, which was the approved entry level at that time.

Shortly after Ms. Culberson's employment, in January and March of 1980, two white male attorneys were hired to work in the Detroit office. They were, like Ms. Culberson, recent bar admittees and were hired, like Ms. Culberson, at the GS-9 grade level and promoted to the GS-11 grade level in one year.

After exhausting administrative remedies, Ms. Culberson filed an action in the district court on April 12, 1983, claiming race and sex discrimination under Title VII and a violation of the Equal Pay Act. In essence, the basis of all of Ms. Culberson's claims is the fact that attorneys Faes and Cunningham were employed at a grade and salary level higher than she was by the Detroit office. After a two-day bench trial, the district court found against Ms. Culberson on all counts and entered a judgement in favor of the defendant on January 2, 1987.

The district court found that Ms. Culberson had failed to establish a prima facie claim under either the Equal Pay Act or Title VII. Even if she had established a prima facie claim, the court held that legitimate business reasons justified any pay differential. We agree.

Therefore, upon consideration of the entire record, the briefs filed herein, and after oral argument, we AFFIRM the judgment of the district court for the reasons set forth in its Findings of Fact and Conclusions of Law on July 2, 1987.

No. 87-1708
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EVA J. CULBERSON,
Plaintiff-Appellant
v.
VETERANS ADMINISTRATION,
Defendant-Appellee

(Filed August 15, 1988)

BEFORE: MILBURN, GUY and NORRIS, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

DISTRICT COURT CONCLUSIONS

Detroit, Michigan
Thursday, July 2, 1987

- - - - -

(At 9:00 a.m. proceedings were commenced.)

THE CLERK OF THE COURT: Case Number 83-3331 Culberson versus the United States.

MR. TAYLOR: Ready.

THE COURT: Anything further, Mr. Taylor.

MR. TAYLOR: No, sir, Your Honor.

THE COURT: Mr. Overman?

MR. OVERMAN: Nothing, Your Honor.

THE COURT: Let me -- let the Court return to you the exhibits which I have completely examined.

The plaintiff, Eva Culberson, commenced this action in August of 1983. Proceeded in this

being race discrimination, second being sex discrimination, and finally she alleges violations of the Equal Pay Act.

The matter was tried over a two day period, and the Court having reviewed the testimony and the exhibits submitted by the parties on both sides, the Court makes the following findings of fact and conclusions of law.

The jurisdiction of the Court is based upon violations of Title VII, mainly sex and race discrimination and violations of the Equal Pay Act. The Court finds that the plaintiff is a black female who in September of 1979 applied for the position of -- as an attorney with the local office of the Veteran's Administration, the defendant here. Although the plaintiff was a law school graduate, she had not yet passed the bar, Michigan bar examina-

tion. And, therefore, was not an attorney admitted to practice law.

The defendant, however, offered to hire the plaintiff as a law clerk at the pay grade of GS 9, with the understanding that her position would be converted to attorney if and when she passed the bar examination. The plaintiff accepted the GS 9 law clerk position in October -- on October 21 of 1979. The plaintiff was notified in early November of 1979, not quite a month later, probably two weeks later that she passed the bar examination. Upon that notice, the plaintiff notified the defendant in November of 1979 that she had in fact passed the bar exam.

On December 30, 1979, the defendant local office did convert plaintiff's position from a law clerk GS 9 to attorney GS 9. When plaintiff

inquired subsequently about her pay, she was told that she could not be promoted to a GS 11 until she completed the time and grade requirement and served one year as a GS 9, GS 9 attorney. He pay was not raised to a GS 11 until November of 1980, which is just one year later.

Plaintiff's complaint in this case alleges race discrimination first, and second sex discrimination. And as I indicated the third being violations of the pay act. Plaintiff essentially contended during the course of the trial that she was discriminated against on the basis of her race and sex by the failure of the defendant district counsel, the district counsel's failure to raise her pay to GS 11. And in fact, not hiring her as a GS 11 in the first instance, and by especially failing to promote her to GS 11 after she passed the bar examination.

She now asserts that during the interview process, defendant district office promised her that she would be promoted to a GS 11 level after she passed the bar exam. She further contends that she performed work of equal skill effort and responsibility to work performed by certain mail employees of the department, but was nevertheless paid less for the work because she is a woman.

Since the claims were presented separately, I will try to discuss them separately in my findings of fact. Starting first with plaintiff's claim of race discrimination. Plaintiff, during the course of the trial based her claim of race discrimination on disparate treatment. She claims that she was hired as a GS 9 rather than a GS 11 because she was black. She failed however to present any evidence that she was treated differently on the basis of her race. The plaintiff was hired as a law clerk at the

GS 9 level. She could not have been under any circumstances hired as an attorney because she was not admitted to the state bar. She was the first law clerk ever hired by the Detroit office. From January 1979 -- 1978 through December of 1980, however, eight law clerks were hired by the general counsel of the Veteran's Administration to serve in various field offices. Three of those clerks including the plaintiff were black females. Two were white males, and three were white females. All were hired at a Gs 9 level.

It's clear to the Court that plaintiff was treated the same as all other persons hired as law clerks. In addition of the six candidates, the defendant submitted to the office of general counsel of the Veteran's Administration in Washington for consideration for the new position that the Detroit office, the defendant elected to recommend plaintiff

for that position. The Court also notes that the minimum salary that the plaintiff listed on her application was below the GS 9 level. She voluntarily indicated that she would consider employment at $16,000, and the GS 9 level at the time was $17,500.

Plaintiff's second race discrimination claim is based upon defendant's failure to promote or to convert her position to GS 11 immediately after she passed the bar examination, and was and had become a lawyer. Plaintiff bases this claim primarily on the fact that at the same time the defendant hired her, defendant transferred a white male to an entry level of attorney position at G -- at the GS 12 level. Defendant also had hired entry level attorneys at GS 11 level in prior years. Plaintiff further relies on Mr. Fernholz alleged promise that she would be converted to GS 11 after she became an attorney admitted to practice law. Fernholz who interviewed

the plaintiff and recommended her for the position, of course, denied in his testimony making such a promise to plaintiff. The testimony at trial however clearly established that the local field offices and their officers employed here do not set pay rates for the Veteran's Administration. Neither the district counsel or the deputy district counsel or anyone in the local office has any authority to set pay rates for the Veteran's Administration. All new hires and transfers and their pay rates must be authorized by the office of the general counsel located in Washington, D.C..

In this case, the evidence shows that the defendant was recruiting for an entry level attorney. The recruitment notices did not mention the salary offer. Mr. Fernholz testified that In October of 1979, he was authorized to hire at the GS 9 level. Mr. Coy, a personnel officer for the general counsel

confirmed that fact. Mr. Fernholz submitted a list of six names to the general counsel, all of whom he believed had agreed to work at the GS 9 level. He indicated in the letter that other qualified individuals had applied for the position, but these other individuals would not be willing to work or be hired in at a GS 9 level. Even if Mr. Fernholz did promise plaintiff a GS 11 position after she passed the bar, he did so obviously from the regulations without any authorization. While plaintiff may have some kind of claim for breach of that promise, if the promise was made, the mere fact of the breach itself or the mere fact that he did not fulfill that promise certainly is not evidence of discrimination, unless the plaintiff was treated differently than other similarly situated employees.

The plaintiff in this case sought promotion or conversion to GS 11 only one month after she

was hired in as a GS 9. The defendant eventually denied the change because a VA employee must serve one year in a GS 9 grade before being promoted to a GS 11. That is clearly the time and grade requirement that is not only applicable to VA personnel attorneys as well as other personnel, it's typical throughout Government service.

The Court finds that the defendant did have such a rule, and that the general counsel had never granted an exception to that rule. According to the testimony the defendant did attempt to have the rule waived in plaintiff's case, but the defendant was unsuccessful. It is also clear from the evidence that plaintiff was not the only entry level attorney hired at the GS 9 pay grade. In January and March of 1980, the defendant hired two while male attorneys at GS 9, for the Detroit office. These attorneys like the plaintiff were promoted to GS 11 in

January and March of 1981, one year after they had served at the GS 9 level. In addition, the records compiled by the assistant general counsel demonstrate that between 1978, and 1980, 28 attorneys were hired at the GS 9 level, and were not promoted to GS 11 until they had served at least one year in the GS 9 grade level, being exactly comparable to what plaintiff had to do.

Plaintiff in this case tries to prove disparate treatment by comparing herself with two attorneys hired in the Detroit office, namely, defendant -- namely, Maureen Faes, whom defendant hired in 1977 at an entry level of GS 11. Faes, however, the court finds had been a member of the bar for two years, and had previous experience as a school teacher. And it's very clear from the evidence that the defendant believed at the time that that was valuable experience and valuable background

that they could use in instructing other personnel at the district office, and obtained her for that purpose.

In addition, in 1977, the general counsel approved GS 11 for an entry position. In 1979, however, when the plaintiff was hired, the general counsel had adjusted the entry level position even reducing it to GS 9 as part of an effort to reduce what they described, that the general counsel described as classification creep. The Court finds that the plaintiff simply was not similarly situated to Maureen Faes. The plaintiff also compares herself with a one Richard Cunningham who was transferred to the district counsel office at the same time the plaintiff was hired. Cunningham was an attorney at the time he was transferred, and had previous experience as the chief of the field services in a competitive service of the Veteran's Administration.

He had been a GS 12 at his prior position, and the general counsel authorized the defendant district counsel to continue Mr. Cunningham at that grade as an attorney.

It's apparent to the Court that throughout Government service, if someone is employed by the Government in a certain pay level, and they are transferred within the same executive branch of some other office, they do not and cannot reduce their pay. They might reduce the grade level and increase them at a step comparable to the position, comparable to the salary they had prior to changing positions. But even if the defendant lowered Cunningham's grade, as I say, they still would have had to pay him an amount equivalent to GS 12 because he transferred from another part of the agency.

Thus, the Court finds that the plaintiff is not similarly situated to Cunningham. The defendant in this case hired plaintiff at the GS 9 level, and promoted her one year later and the Court finds that they did that pursuant to its regulations. The evidence further shows that the defendant hired two other entry level attorneys at GS 9, a few months after it hired the plaintiff. And promoted these two other hirees to a GS 11 one year after they served in the GS 9 grade level. The other new attorney brought in in 1979 was transferred from another office, and was not newly hired. He retained the GS 12 pay level that he had achieved as a supervisor in a competitive service. In other words, the Court finds that plaintiff has failed to present any evidence that she was treated differently because she is black in either terms of hiring or promotion. Accordingly, her race discrimination claim is dismissed.

Next, plaintiff has alleged here sex discrimination, contending that she was treated differently because she is a woman. And she relies primarily on the same evidence set forth on her race discrimination count. Plaintiff in this case has also relied on the statement by Mr. Fernholz that he could understand her insisting on the raise prior to the expiration of the year if she was married and had kids. In the Court's view, I simply don't believe that this is any evidence of sex discrimination taken in the context that statement was made, if it was made. We find that Mr. Fernholz made that during a debate or an argument from plaintiff that she should be raised immediately to GS 11. The evidence, the documentary evidence shows that there was actually a small amount differentiating GS 9, I think $17,500 and the GS 11 at the time being something like $20,456. In that context, taking that small difference naturally, you might say, I can understand

your financial pinch if you were married and had children, but I can't understand it because you are single. I simply fail to see any sex discrimination evidence in that kind of a statement. Fernholz explained to plaintiff that he simply could not obtain authorization to raise her to GS 11 before she served a year in GS 9. And it's very clear from this evidence, that Mr. Fernholz apparently wanted plaintiff to stay on as an attorney at the V.A. despite the pay differential. And he believes and he clearly believed that slight difference, and it should not make a real big difference to a person that was unmarried. Well the comment may have been inappropriate or may have been in poor taste or whether he should have known it could have been taken as the plaintiff took it in another context, is certainly not evidence of discrimination. Particularly when he was the person who recommended plaintiff for the job, and he was the person that requested

from the general counsel that an exception to the time and grade rule be made in plaintiff's case.

It's clear from the record that plaintiff was paid the same as two other new hires, GS 9. It's clear from the record that she was promoted to GS 11 as soon as she became eligible under the time and grade requirement just like everyone else. And there's simply no evidence of disparate treatment of plaintiff because of sex discrimination, and that claim is also dismissed.

Finally, plaintiff contends that she performed the same work as a male employee, namely Mr. Cunningham, and was paid less than he was for it. It appears from the evidence introduced at trial, that plaintiff and Mr. Cunningham did in fact perform similar work under similar working conditions.

The plaintiff was involved in law enforcement activities, administrative tort claims, loan guarantee work, probate matters, landlord tenant work, collections, acquisitions and opinion writing, work in the Court's view, which is not complicated, it's fairly simple work, requires no extra skill, and any attorney who has freshly passed the bar ought to be able to do that work.

Plaintiff testified that other attorneys in the office with few exceptions also handled these various areas of work, but they she claims were paid more. The evidence demonstrates that all attorneys at the district counsel office performed this type of work. But it's very clear that the work is assigned to attorneys or can be assigned to any attorney as it comes in through the authority of the district counsel. He testified that if any case in any of those areas came in and happened to have com-

plicated factors to it, or happened to have circumstances involving numerous phases to it, too complicated, he then would of course, assign that to a more experienced and to a more senior lawyer. But even if all the attorneys performed the same work, however, the Court finds that plaintiff failed to establish a violation of Equal Pay Act.

Plaintiff compares herself to Mr. Cunningham who was hired at GS 12, while ignoring at the same time Mr. Golski and Mr. LaFave who also did similar work and were hired at a GS 9.

The Court finds that the plaintiff cannot choose one male out of many males working there and compare herself to that particular one male. Even if the comparison were appropriate, the defendant in this case established a legitimate exception under the Equal Pay Act, namely that Mr.

Cunningham was transferred within the agency and simply maintained his level of pay within the GS system as required by the regulations.

The Court finds a total lack of evidence in the record establishing a violation of Equal Pay Act, and that complaint is dismissed. And, therefore, the entire complaint is dismissed and Judgment will be entered for the defendant. You may present that judgment.

MR. OVERMAN: Thank you, Your Honor.

THE COURT: Court adjourned.

(At 9:40 a.m. proceedings were adjourned)

APPLICABLE STATUTES

42 U.S.C. Sec. 2000e-2. Unlawful employment practices

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would depirve or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

42 U.S.C. Sec. 2000e-16. Employment by Federal Government

Discriminatory practices prohibited; employees or applicants for employment subject to coverage

(a) All personnel actions affecting employees or applicants for employment. . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statues or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

28 U.S.C. 206 (d) (1)
Prohibition of sex discrimination

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or

any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Title 5 U.S. Code

Sec. 5101. Purpose

It is the purpose of this chapter to provide a plan for classification of positions whereby --

(1) in determining the rate of basis pay which an employee will receive --

(A) the principle of equal pay for substantially equal work will be followed; and

(B) variations in rates of basic pay paid to different employees will be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of employees to efficiency and economy in the service; and

(2) individual positions will, in accordance with their duties, responsibilities, and qualification requirements, be so grouped and identified by classes and grades, as defined by section 5102 of this title, and the various classes will be so described in published standards, as provided by section 5105 of this title, that the resulting position-classification system can be used

in all phases of personnel administration. *Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 443*

Sec. 5102. Definitions; application

(a) For the purpose of this chapter [5 USCS Sec. 5101 et seq.] --

(1) "agency" means --
(A) an Executive agency;

(2) "employee" means an individual employed in or under an agency;

(3) "position" means the work, consisting of the duties and responsibilities, assignable to an employee;

(4) "class" or "class of position" includes all positions which are sufficiently similar, as to --
(A) kind or subject-matter of work;
(B) level of difficulty and responsibility; and
(C) the qualification requirements of the work; to warrant similar treatment in personnel and pay administration; and

(5) "grade" includes all classes of positions which, although different with respect to kind or subject-matter of work, are sufficiently equivalent as to --

(A) level of difficulty and responsibility; and
(B) level of qualification requirements of the work; to warrant their inclusion within one range of rates of basic pay in the General Schedule.

(b) Except as provided by subsections (c) and (d) of this section, this chapter [5 USCS Sec. 5101 et. seq.] applies to all civilian positions and employees in or under an agency, . . .

Sec. 5104. Basis for grading positions

The General Schedule, the symbol for which is "GS," is the basic pay schedule for positions to which this chapter [5 USCS Sec. 5101 et seq.] applies. The General Schedule is divided into 18 grades of difficulty and responsibility of work, as follows:

. . .

(9) Grade GS-9 includes those classes of positions the duties of which are:

(A) to perform, under general supervision, very difficult and responsible work along special technical, supervisory, or administrative lines in office, business, or fiscal administration, requiring --

(i) somewhat extended specialized training and considerable specialized, supervisory, or administrative experience which has demonstrated capacity for sound independent work;

(ii) thorough and fundamental knowledge of a special and complex subject matter, or of the profession, art, or science involved; and

(iii) considerable latitude for the

exercise of independent judgement;

(B) with considerable latitude for the exercise of independent judgement, to perform moderately difficult and responsible work, requiring --

(i) professional, scientific, or technical training equivalent to that represented by graduation from a college or university of recognized standing; and

(ii) considerable additional professional, scientific, or technical training or experience which has demonstrated capacity for sound independent work; or

(C) to perform other work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.

. . .

(11) Grade GS-11 includes those classes of positions the duties of which are --

(A) to perform, under general administrative supervision and with wide latitude for the exercise of independent judgment, work of marked difficulty and responsibility along special technical, supervisory, or administrative lines in office, business, or fiscal administration, requiring --

(i) extended specialized, supervisory, or administrative training and experience which has demonstrated important attainments and market capacity for sound independent action or decision; and

(ii) intimate grasp of a specialized and complex subject matter, or of the profession, art, or science involved, or of administrative work of marked difficulty;

(B) with wide latitude for the exercise of independent judgment, to perform responsible work of considerable difficulty requiring somewhat extended professional, scientific, or technical training and experience which has demonstrated important attainments and marked capacity for independent work; or

(C) to perform other work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.

(12) Grade GS-12 includes those classes of positions the duties of which are --

(A) to perform, under general administrative supervision, with wide latitude for the exercise of independent judgment, work of a very high order of difficulty and responsibility along

special technical, supervisory, or administrative lines in office, business, or fiscal administration, requiring --

(i) extended specialized, supervisory , or administrative training and experience which has demonstrated leadership and attainments of a high order in specialized or administrative work; and

(ii) intimate grasp of a specialized and complex subject matter or of the profession, art, or science involved;

(B) under general administrative supervision, and with wide latitude for the exercise of independent judgment, to perform professional, scientific, or technical work of marked difficulty and responsibility requiring extended professional, scientific, or technical training and experience which has demonstrated leadership and attainments of a high order in professional, scientific, or technical research, practice, or administration; or

(C) to perform other work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.

(13) Grade GS-13 includes those classes of positions the duties of which are --

(A) to perform, under administrative direction, with wide latitude for the exercise of independent judgment, work of unusual difficulty and responsibility along special technical, supervisory, or administrative lines, requiring extended specialized, supervisory, or administrative training and experience which has demonstrated leadership and marked attainments;

(B) to serve as assistant head of a major organization involving work of comparable level within a bureau;

(C) to perform, under administrative direction, with wide latitude for the exercise of independent judgment, work of unusual difficulty and responsibility requiring extended professional, scientific, or technical research, practice, or administration; or

(D) to perform other work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.

Sec. 5107. Classification of positions

Except as otherwise provided by this chapter, each agency shall place each position under its jurisdiction in its appropriate class and grade in conformance with standards published by the Office of Personnel Management or, if no published standards apply directly, consistently with published standards. When

facts warrant, an agency may change a position which it has placed in a class or grade under this section from that class or grade to another class or grade. Subject to subchapter VI of chapter 53 of this title, these actions of an agency are the basis for pay and personnel transactions until changed by certificate of the Office. *Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 453; Pub.L. 95-454, Title VIII, Sec. 801(a)(3)(E), Title IX, Sec. 906(a)(2),(3), Oct. 13, 1978, 92 Stat. 1222, 1224.*

Sec. 5332. The General Schedule

(a) The General Schedule, the symbol for which is "GS", is the basic pay schedule for positions to which this subchapter applies. Each employee to whom this subchapter applies, except an employee covered by the merit pay system established under section 5402 of this title, is entitled to basic pay in accordance with the General Schedule.

Sec. 5333. Minimum rate for new appointments; higher rates for supervisors of prevailing rate employees

(a) New appointments shall be made at the minimum rate of the appropriate grade. However, under regulations prescribed by the Office Of Personnel Management which provide for such considerations as the existing pay or unusually high or unique qualifications of the candidate, or a special need of the Government for his services, the head of an agency may appoint, with the approval of the Office in each specific case, an individual to a position in GS-11 or above at such a rate above the minimum rate of

the appropriate grade as the Office may authorize for this purpose. The approval of the Office in each specific case is not required with respect to an appointment made by the Librarian of Congress. *Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 467; Pub.L. Sec. 1(19), Sept. 11, 1967, 81 Stat. 199; Pub.L. 95-454, Title IX, Sec. 906(a)(2), (3), Oct. 13, 1978, 92 Stat. 1224;; Pub.L. 96-54, Sec. 2(a)(26)(A), Aug. 14, 1979, 93 Stat. 382.*

Sec. 5334. Rate on change of position or type of appointment; regulations

(a) The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management in conformity with this subchapter and chapter 51 of this title when --

(1) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter does not apply;*

(2) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter applies to another such position;

(3) he is demoted to a position in a lower grade;

(4) he is reinstated, reappointed, or reemployed in a position to which this subchapter applies following service in any position in the legislative, judicial, or executive branch;

(5) his type of appointment is changed;

(6) his employment status is otherwise changed; or

(7) his position is changed from one grade to another.

(b) An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred. If, in the case of an employee so promoted or transferred who is receiving basic pay at a rate in excess of the maximum rate of his grade, there is no rate in the higher grade which is at least two step-increases above his existing rate of basic pay, he is entitled to --

(1) the maximum rate of the higher grade; or

(2) his existing rate of basic pay, if that rate is the higher. If an employee so promoted or transferred is receiving basic pay at a rate saved to him under subchapter VI of this chapter on reduction in grade, he is entitled to --

(A) basic pay at a rate two steps above the rate which he would be receiving if subchapter VI of this chapter were not applicable to him; or

(B) his existing rate of basic pay, if that rate is the higher.

Sec. 5361. Definitions

For the purpose of this subchapter --

(1) "employee" means an employee to whom chapter 51 of this title applies, and a prevailing rate employee, as defined by section 5341(a)(2) of this title, whose employment is other than on a temporary or term basis;

(2) "agency" has the meaning given it by section 5102 of this title;

(3) "retained grade" means the grade used for determining benefits to which an employee to whom section 5362 of this title applies is entitled;

(4) "rate of basic pay" means, in the case of a prevailing rate employee, the scheduled rate of pay determined under section 5343 of this title;

(5) "covered pay schedule" means the General Schedule, any prevailing rate schedule established under subchapter IV of this chapter, or the merit pay system under chapter 54 of this title;

(6) "position subject to this subchapter" means any position under a covered pay schedule; and

(7) "reduction-in-force procedures" means procedures applied in carrying out any reduction in force due to a reorganization, due to lack of funds or curtailment of

work, or due to any other factor. ***Added Pub.L. 95-454, Title VIII, Sec 801(a)(1), Oct. 13, 1978, 92 Stat. 1218.***

Sec. 5362. **Grade retention following a change of positions or reclassification**

(a) Any employee --

(1) who is placed as a result of reduction-in-force procedures from a position subject to this subchapter to another position which is subject to this subchapter and which is in a lower grade than the previous position, and

(2) who has served for 52 consecutive weeks or more in one or more positions subject to this subchapter at a grade or grades higher than that of the new position, is entitled, to the extent provided in subsection (c) of this section, to have the grade of the position held immediately before such placement be considered to be the retained grade of the employee in any position he holds for the 2-year period beginning on the date of such placement.

(b) (1) Any employee who is in a position subject to this subchapter and whose position has been reduced in grade is entitled, to the extent provided in subsection (c) of this section, to have the grade of such position before reduction be treated as the retained grade of such employee for the 2-year period beginning on the date of the reduction in grade.

(2) The provisions of paragraph (1) of this subsection shall not apply with respect to any reduction in the grade of a position which had not been classified at the higher grade for a continuous period of at least one year immediately before such reduction.

(c) For the 2-year period referred to in subsections (a) and (b) of this section, the retained grade of an employee under such subsection (a) or (b) shall be treated as the grade of the employee's position for all purposes (including pay and pay administration under this chapter and chapters 54 and 55 of this title, retirement and life insurance under chapters 83 and 87 of this title, and eligibility for training and promotion under this title) except --

(1) for purposes of subsection (a) of this section,

(2) for purposes of applying any reduction-in-force procedures,

(3) for purposes of determining whether the employee is covered by the merit pay system established under section 5402 of this title, or

(4) elects in writing to have the benefits of this section terminate. ***Added Pub.L. 95-454, Title VIII, Sec. 801(a)(1), Oct. 13, 1978, 92 Stat. 1219.***

Sec. 5363. **Pay retention**

(a) Any employee --

(1) who ceases to be entitled to the benefits of section 5362 of this title by reason of the expiration of the 2-year period of coverage provided under such section;

(2) who is in a position subject to this subchapter and who is subject to a reduction or termination of a special rate of pay established under section 533 of this title; or

(3) who is in a position subject to this subchapter and who (but for this section) would be subject to a reduction in pay under circumstances prescribed by the Office of Personnel Management by regulation to warrant the application of this section;

is entitled to basic pay at a rate equal to (A) the employee's allowable former rate of basic pay, plus (B) 50 percent of the amount of each increase in the maximum rate of basic pay payable for the grade of the employee's position immediately after such reduction in pay if such allowable former rate exceeds such maximum rate for such grade.

(b) For the purpose of subsection (a) of this section, "allowable former rate of basic pay" means the lower of --

(1) the rate of basic pay payable to the employee immediately before the reduction in pay; or

(2) 150 percent of the maximum rate of basic pay payable for the grade of the employee's position immediately after such reduction in pay.

(c) The preceding provisions of this section shall cease to apply to an employee who --

(1) has a break in service of one workday or more;

(2) is entitled by operation of this subchapter or chapter 51, 53, or 54 of this title to a rate of basic pay which is equal to or higher than, or declines a reasonable offer of a position the rate of basic pay for which is equal to or higher than, the rate to which the employee is entitled under this section; or

(3) is demoted for personal cause or at the employee's request. ***Added Pub.L. 95-454, Title VIII, Sec. 801(a)(1), Oct. 13, 1978, 92 Stat. 1219.***

Title 5 Code of Federal Regulations

Sec. 536.208 Demotion for personal cause or at an employee's request.

(a) Under 5 U.S.C. 5362(d)(2) and 5 U.S.C. 5363(c)(3), grade and pay retention, respectively, cease to apply to an employee who is reduced in grade for personal cause or at his or her own request.

(b) A demotion for personal cause is an action based on the conduct, character, or unacceptable performance of an employee.

(c) A demotion is considered to be at an employee's request if the demotion is initiated by the employee for his or her benefit, convenience or personal advantage, or when the employee

requests or consents to a demotion in lieu of a proposed adverse action for personal cause.

Sec 536.212 Extension of pay retention to employees in other circumstances.

(a) Under 5 U.S.C. 5363(a)(3), the Office of Personnel Management is authorized to prescribe circumstances in which pay retention shall be extended to employees who are not otherwise entitled to pay retention under 5 U.S.C. 5363. The Office of Personnel Management has determined that pay retention shall be extended under this provision, except as provided in paragraph (c) of this section, to any employee whose rate of basic pay would otherwise be reduced:

(1) As a result of reduction in force or reclassification when the employee does not meet the eligibility requirements for grade retention;

(2) As a result of the employee's declination of an offer to transfer with his or her function under circumstances not qualifying the employee for grade retention, reassignment to a position in a lower wage area, or reassignment to a position in a different pay schedule;

(3) As a result of the placement of the employee in a formal employee development program generally utilized Government-wide: Upward Mobility, Apprenticeship, and Career Intern Programs; or as the result of placement in a position which the agency has determined is hard to fill;

(4) Because the employee no longer meets a specific condition or requirement established by the agency or the Office of Personnel Management, such as allowable periods of service in foreign areas or qualifications requirements (including physical standards); or

(5) As the result of the reduction or elimination of scheduled rates, except those reflecting a decrease in the level of prevailing rates as determined by a wage survey, and the reduction or elimination of special schedules or special rates, other than those authorized under 5 U.S.C., 5303 (for which pay retention is provided by law).

(b) Except as provided in paragraph (c), an agency may extend pay retention to any employee whose rate of basic pay would otherwise be reduced:

(1) Under circumstances similar to those listed in paragraph (a); or

(2) As a result of a personnel action initiated by management to further an agency's mission, in accordance with the general intent of subchapter VI of chapter 53 of title 5, United States Code.

(c) This section does not extend pay retention to any employee:

(1) Who is reduced in grade or pay as a result of the termination of a temporary promotion; or

(2) Who is reduced in grade or pay for personal cause or at the employee's request.

(d) An employee to whom pay retention is extended by this section shall receive retained pay in accordance with the provisions of 5 U.S.C,. 5363 and the applicable sections of this part.

Sec. 536.213 Grade and pay retention in other circumstances

Under 5 U.S.C. 5365(b)(2)-(3), the Office of Personnel Management may provide for the application of all or portions of grade and pay retention benefits in circumstances not covered under 5 U.S.C. 5362-5363. the Director, Office of Personnel Management, or his or her designee, is authorized to approve, at the request of an agency, the application of grade and pay retention benefits, or any appropriate portion thereof, in such situations as that official determines appropriate and necessary.

Sec. 2301. Merit system principles

(a) This section shall apply to --

(1) An Executive agency;

. . .

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and

advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

Sec. 2302. **Prohibited personnel practices**

(a) (1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section --

(A) "personnel action" means --

(i) an appointment;
(ii) a promotion;

(viii) a performance evaluation

under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is inconsistent with the employees salary or grade level; with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority --

(1) discriminate for or against any employee or applicant for employment --

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

. . .

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of --

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

. . .

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

. . .

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or

injuring the prospects of any particular person for employment;

. . .

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with an enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under --

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 20003-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

. . .

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d), prohibiting discrimination on the basis of sex;

. . .

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation. ***(Added Pub.L. 95-454, Title I, Sec. 101(a), Oct. 13, 1978, 92 Stat. 1114.)***

PLAINTIFF'S EXHIBIT 2

Veterans Administration
Washington, D.C. 20420

September 1, 1968

VA QUALIFICATION STANDARD

LEGAL CLERK SERIES GS-904

Auth: Schedule A, Section 213.3102

MP-5, Part I, Chapter 17, Paragraph 4

*LAW CLERK

All provisions of the VA QUALIFICATION STANDARD FOR GENERAL ATTORNEY, GS-905-9/12, Parts I and II, dated September 1, 1968 are applicable except the BAR MEMBERSHIP REQUIREMENTS.

*Appointment to the position of Law Clerk is made under the provisions of Schedule A, FPM Ch. 213, App. C, (Sec. 213.3102(2)).

VA QUALIFICATION STANDARD
PART I

Date: September 1, 1968
Auth: USCSC Rule VI, (FPM Supplement 990-1, Book III-6). FPM Ch. 302, Subchapter 2-9 and FPM LTRE 302-4, 8-22-68

GENERAL ATTORNEY GS-905-9/15
(Law Clerk--See GS-904-Legal Clerk)

BAR MEMBERSHIP REQUIREMENTS;

Be a member in good standing of the bar of a State or Territory of the United States or the District of Columbia. Where the duties of the position call for appearance in court, the applicant must be a member in good standing of the bar, or be eligible for admission to the bar, of the State or Territory of the United States or the District of Columbia in which he is to serve.

CITIZENSHIP:

Be citizens of, or owe allegiance to, the United States.

EDUCATION:

Possess a Bachelor of Laws or Juris Doctor degree from a law school or be awarded such before appointment.*

*The education requirements are not applicable to those employees serving in Attorney positions in the VA as of the date of this Standard.

EXPERIENCE:

In one or any combination of the following types in the amounts indicated for each grade following:

a. Practice of law.

b. Other legal experience of a responsible nature in any or a combination of the following: As a law clerk; in legal research; in analysis of statutes; or in examination, investigation, or adjust-

ment of claims arising under law, contract, or governmental order.

c. In the military, naval, or other Federal service in the disposition of legal problems, as a reviewing officer, as a member of courts or boards, or in investigation activities.

GS-9: None required; however, acquired experience will be considered.

GS-11: (a) One year of experience as described above, or

(b) Graduation in the upper one-third of his law class or one of the six alternate options of The Superior Law Student Program:

(1) Work or achievement of significance on his law school's Official Law Review. . . or

(2) Special high-level honors for academic excellence in law school, such as election to the Order of the Coif,. . . or

(3) Winning a moot court competition or membership on the moot court team which represents the law school in competition with other law schools. . . or

(4) Full-time or continuous participation in a legal aid program as opposed to one-shot, intermittent or causal participation. . . or

(5) Significant summer law-office clerk experience. . . or

(6) Other equivalent evidence of superior achievement. Candidates applying under this option will be required to furnish certification from the registrar of ranking and other attainments in law school, or

(c) Possession of the L.L.M. degree.

GS-12: (a) Two years of progressively responsible experience as described above or

(b) Graduation in the upper 15% of his law class and possess the L.L.M. degree in a field of law directly

pertinent to the work of the position to be filled.

GS-13: Three years of progressively responsible experience as described above.

GS-14: Four years of progressively responsible experience as described above.

GS-15: No additional experience is required, but candidates must have demonstrated the professional and administrative abilities required to perform at the appropriate levels.

For grades GS-12/15 only, a maximum of one year of the above required experience may be acquired prior to admission to the bar.

For any grade, the required amount of experience will not in itself be accepted as proof of qualification. The applicant's experience and training must show that he has the ability to perform the duties of the position.

Applicants must submit with their application (SF 171), in addition to the information thereon required, a list of important suits, prosecutions, cases, or other legal or legislative matter, if any, in which they have participated, describing the nature of each and stating their connection therewith.

ORAL INTERVIEW (GS-9, GS-11 and GS-12 entrants into the legal profession)

Applicants must successfully pass an oral interview before appointment is made. The factors to be considered in this interview will be appearance, neatness, personality, ability to express one's self,

aptitude and interest in Federal legal work as a career, and the ability to answer technical questions of law.

PHYSICAL REQUIREMENTS:

Must be physically able to perform efficiently the duties of the positions. Good vision in one eye and ability to read without strain printed material the size of typewritten characters are required, glasses permitted. Ability to hear the conversational voice, with or without a hearing aid is required for most positions; however, some positions may be suitable for the deaf. In most instances, an amputation of leg or foot will not disqualify an applicant for appointment, although it may be necessary that his condition be compensated by use of satisfactory prosthesis. Applicants must possess emotional and mental stability. Any physical condition which would

cause the applicant to be a hazard to himself or to others will disqualify him for appointment.

Specific requirements which would not infract the last stated general requirement may be waived by the appropriate appointing authority. Recommendation of a physician may be obtained.

SELECTIVE CERTIFICATION:

Where the volume of work in one particular subject-matter field (such as administrative law, legislation, guardianship, loans, torts, or any of the several veterans' benefits, litigations, etc.) is such as to require that the appointee be specifically qualified in that field, selective certification may be used. Such cases will be substantiated by written justification.

This standard supersedes the VA Qualification Standard for General Attorney, GS-905-7/15, dated December 1, 1966.

VA QUALIFICATION STANDARD

Part II

EXAMINING GUIDE

The following Tentative Rating Schedule is to be used in conjunction with Rating Procedure No. III, Three Quality Level Rating Table FPM Supplement 337-76, with such modifications as are described below.

Selection of attorneys for appointment or promotion will be made on the basis of merit and fitness for the particular position. Each grade from GS-9 to GS-15 will be considered separately and rated on the basis of a full analysis of training and experience, quality of performance, and personal potentialities for successful employment.

DEFINITION OF TERMS:

Practice of law is defined as private, state, or Federal practice in any field of law.

Other legal experience of a responsible nature is defined as experience in a law office, government office, or in the legal department of a business establishment, in the armed forces, or other Federal Service, doing legal research, making analysis of statutes, writing opinions; or the writing of authoritative or advisory legal opinions involving interpretation of state or Federal laws, regulations and orders, or the drafting of such regulations or orders; or the drafting, analysis, and other legal activities with respect to bills, regulations, Executive Orders, proclamation, statutory regulations.